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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Telecommunications Services Inside Wiring	)	CS Docket No. 95-184
	)	
Customer Premises Equipment	)	
	)	
In the Matter of	)	
	)	
Implementation of the Cable Television Consumer Protection and Competition Act of 1992:	)	MM Docket No. 92-260
	)	
Cable Home Wiring	)	

REPLY COMMENTS OF COMPETITIVE SERVICE PROVIDERS

These reply comments are filed on behalf of competitive service providers United States Wireless Systems, Inc. and Ohio Valley Wireless, Inc. ("Competitive Service Providers") who seek to compete with entrenched franchised cable operators in offering service to multiple dwelling units ("MDU's).

1. The Commission's Proposal Is Impermissible Protective Regulation. The Cable Services Bureau, in another stunning example of its penchant for adoption of regulations that protect its regulatory client - the franchised cable monopoly - from any nascent competition that might benefit the American Consumer - proposes to do three things:

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1. Provide a mandatory 90 day advance warning to franchised cable operators before their service to MDU's can be terminated, giving them 90 days to threaten building owners and tenants who seek to obtain improved service and lower price elsewhere - including making subscribers pay for wiring that already has been paid for in subscriber fees and used as a tax shelter by the franchised cable operator;

2. Give deference to alleged state law rights of franchised cable operators that either don't exist or are as anti-competitive and protective of the franchised cable monopoly as the Bureau's proposed rules; and

3. Create a regulatory scheme that is so complex that it favors franchised cable operators, who are now mostly huge MSO's, and strikes fear into the heart of any MDU owner who does not have a bevy of state and federal regulatory lawyers and lobbyists on permanent retainer.

The Cable Services Bureau just doesn't get it. Congress wants the FCC to promote competition in MDU's. Congress gave the franchised cable industry an exemption from uniform rate regulation that allows franchised cable operators to offer bulk rate discounts to MDU's. This leveled the playing field. No reason exists to protect the franchised cable industry from competition from other providers - or to prevent consumers from getting the lower prices and better service that they deserve.

The Bureau allegedly gets confused over the intricacies of Congress' directive that subscribers should be able to control their wiring so that control over wiring is not used as yet another arm (in addition to control over programming) of the monopoly power of franchised cable operators. No need exists for all of this regulatory head scratching. A "subscriber" is a person who receives cable programming and does not further distribute it. Building owners do not "distribute" cable programming - they simply allow others to distribute it within their property - therefore a building owner is a "subscriber" who is entitled to control all of the wiring within its building.

All of the quibbling over the letter of the Congressional mandate merely serves to distract attention from the message: Congress doesn't want franchised cable to use its inside wiring to further its monopoly power; Congress wants the subscriber to be able to change providers at will and it wants the new provider to have immediate access to the wiring.

2. Anti-competitive franchised cable access laws must be preempted. In an apparent case of a regulatory agency standing law and policy on its head, the Cable Services Bureau proposes to exempt from competitive inside wiring rules those very states that have passed anti-competitive franchised cable access statutes, and only apply so-called competitive inside wiring rules (that are really designed to protect franchised cable from competition) in those states that presently encourage

competition and have refused to adopt franchised cable sponsored access statutes.

Franchised cable access statutes are anti-competitive. They were adopted by state legislatures as a result of lobbying by franchised cable trade associations to force building owners to use franchised cable service instead of making franchised cable compete on price and service with other providers. The states that have adopted franchised cable access statutes are those most in need of prompt application of the Congressional mandate to return control over wiring to the subscriber and prevent its use by the franchised cable industry as an arm of state-law protected monopoly power. Remember, state laws generally dictated exclusive cable franchises - one size fits all monopoly cable service - until Congress banned exclusive cable franchises and mandated that states franchise over-builders.

State laws that give franchised cable operators mandatory access to MDU's must be preempted to effectuate federal law that returns to the subscriber control over wiring, and therefore control over choice based on price and service. Franchised cable operators should have no favored treatment in gaining access to buildings and should have to compete on a level playing field with other providers based upon price and service.

2. The default price must be set at $1 Dollar.

Ironically, after blessing state laws providing for mandatory access to MDU's for franchised cable, the Cable Services Bureau

ignores the state regulatory model as it ponders what default price if any to set for inside wiring. State legislatures that have adopted franchised cable access statutes have expressed no such angst over the value of building owners' and subscribers' rights to control their property and to select their provider based upon price and service. State franchised cable access statutes decree that franchised cable companies shall pay $1 to building owners for the right to enter their property, unless a contrary value can be proved in a court proceeding.

If the Cable Services Bureau wanted to promote competition, instead of protecting franchised cable operators, the Bureau would set a default price of $1 as the value of all inside wiring from the property line, through the risers, the home-runs, and the drops on the grounds that:

1. Wiring once installed is a fixture that belongs to the building owner under most state laws; and

2. The cost of the wiring has already been paid for as part of the service fees collected by the franchised cable operator from the MDU; and

3. The wiring has been depreciated and its installation costs expended by the franchised cable operator and in effect paid for by the taxpayers and consumers whose incomes are not sheltered by such depreciation.

Does the Cable Services Bureau seriously question whether that the cost of inside wiring has already been paid for

by the MDU that has been paying for cable service until deciding to terminate the franchised cable provider? Does the Cable Services Bureau believe that MDU owners and occupants should have to pay the franchised cable operator for the cost of its trucks, or part of its head-end, or the salaries of its installers - as a ransom for terminating service?

No franchised cable operator has installed wiring in any MDU unless it has: a. Assured itself of its ability to recover the cost of that installation over the life of a written service contract; or, b. If it does not have a written service contract, then it has assumed the risk of non-recovery as a promotional cost or subscriber acquisition cost.

The Cable Bureau has no business baby-sitting the franchised cable industry. Many businesses in many industries assume substantial costs in seeking to acquire and retain customers - expenditures that frequently far exceed the cost of wiring a building. In many cases, the risk-taker fails to obtain the customer or loses the customer before it has recouped its cost. This is a tax deductible expense of doing business.

No franchised cable company should receive more than $1 dollar for all of its wiring from the property line throughout the building unless:

1. It has a written contract with the property owner that permits it to recover the cost of the wiring; or

2. It can establish in a court proceeding (without stay of the transfer of ownership) that it has not recovered the cost of the wiring through the cable fees received from the MDU through the date of termination; and

3. It has not depreciated or expended the unrecovered cost as a tax shelter for its cable revenues.

Any such court action should not delay the transfer of ownership of the wiring, the ownership should transfer immediately upon payment of $1, because the only issue in the court proceeding is whether any additional compensation is due, not whether the cable operator has to exit the building and turn over the wiring.

Ten days notice of a change in video service provider, where no written contract has been entered into by the MDU owner with other termination provisions, is more than sufficient notice. The 90 day notice proposed by the Cable Bureau serves only to protect franchised cable from new competition.

3. Paying lip service to consumer choice does not justify continued protection of the franchised cable industry. The Cable Services Bureau continues to bemoan the inability of every MDU occupant to separately chose its provider - for example it proposes to allow loop-though wiring to transfer to a new provider only when every single resident of the building unanimously agrees to terminate the franchised cable operator.

This is ludicrous and serves only to protect franchised cable from competition in loop through buildings.

Unit-by-unit competition cannot and will not work, whether in home-run or loop-through MDU's. Unit-by-unit competition poses a threat to occupants' life and safety that outweighs its alleged increment benefits. Fire-rated construction depends upon limited penetration of walls and stair wells. Building safety demands limited access by personnel employed by third parties. Franchised cable operators, over-builders, satellite operators, wireless cable, private cable, LMDS, and numerous other existing and future service providers cannot all be installing wiring in MDU's to attempt to compete unit-by-unit for business.

Building-by-building competition makes sense. The building owner, for rental properties, and the condominium or coop association, for occupant owned properties, should be considered the "subscriber" and should have the right to control the wiring from the property line throughout the building. On ten days notice, the building owner or association should have the right to purchase the wiring for $1 from any provider that does not have a written contract providing otherwise.

Prompt adoption of this simple rule will result in a level playing field where all providers will have an equal chance to compete for written contracts going forward, either beginning immediately upon adoption of the rule in MDU's with no written

contracts, or upon expiration of the existing written contracts in MDU's that presently have written contracts.

The Commission's rules should be designed to get the government out of the regulatory business and to promote governance by private contract in a competitive environment. The Commission should create a level playing field for competition for new MDU contracts going forward, and then let the market control competition for service to MDU's.

Tenants and unit owners can express their choices to their landlords or management committees and where appropriate and consistent with safety and security concerns such additional wiring as the subscriber - i.e., the owner or governing committee, desires, can be installed. Nothing suggested herein prevents more than one wire where desired, rather the suggestion is that this decision be placed squarely in the hands of the property owner and that federal and state law not favor franchised cable in pitching business to landlords and condo and coop boards based on price and service, without legal threats based on protective regulations.

Conclusion

Wherefore, for the forgoing reasons, the Commission should adopt a pro-competitive inside wiring rule to:

1. Treat the building owner in a rental property and the condo or coop association in an owner occupied property as the "subscriber";

2. Allow the subscriber to purchase all of the wiring in the building from the cable services provider upon ten days notice, or upon termination of an existing written contract;

3. Set the price of the wiring at $1, unless the provider has a written contract providing for a different price or can demonstrate in a court proceeding (without stay of transfer of ownership) that the cost of the wiring has not been recovered from subscriber fees, depreciated or expended.

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I, Magdalene E. Copp, a secretary of the law office of Ross & Hardies, do hereby certify that I have this 6th day of October, 1997, served by first-class mail, postage pre-paid, a copy of the foregoing "Reply Comment of Competitive Service Providers" to:

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